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peals for the Ninth Circuit entered in the above-entitled case on March 22, 1961.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 289 F.2d 86 (1961). A copy of the opinion is attached hereto as Appendix A. No opinions were issued by the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 22, 1961. (Tr. 2583, Appendix B.) Petitioners filed a Petition for Rehearing on April 21, 1961, which was denied on May 15, 1961. (Tr. 2584, Appendix C.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit, having been reversed successively on *Radovich v. National Football League*, 352 U.S. 445 (1957); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), can nullify those decisions of this Court in as obvious a manner as has been done here?

2. Whether an Appellate Court can take away from a jury the question of causal effect concerning an injury by

a 100% two-company monopoly (admittedly achieved pursuant to an intent to monopolize) when the question of violation is confessed and the issue of measurement of damages is more than sufficiently supported by relevant economic data and where the destruction of the plaintiff company (petitioners herein) was admitted to be, by a chief executive officer of a defendant, an important goal of the monopolists?

3. Whether this Court can tolerate a decision to stand involving an admitted refusal of the trial Court to follow this Court's opinion in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946) on the ground that "somebody has to start reversing the Supreme Court." (This statement was actually and seriously made by the trial Court.) The Court of Appeals side-stepped this issue, but went on to give an interpretation of the *Bigelow* case about which it acknowledged it was "not sure", thus compounding the trial Court's admitted refusal to apply *Bigelow* with its own misconstruction.

4. Whether this Court's decision in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946) is applicable only to cases wherein the complaint is of a "general loss inflicted by the defection of countless, individual customers" or whether it is also applicable to a case, such as the instant case, wherein plaintiffs proved an inability to succeed in a monopoly market and a resultant loss of specific business arrangements and all necessary sources of supply and customers? The Ninth Circuit stated it was "not sure". (Opinion, Appendix A, page 11.)

5. Whether petitioners, an American company, can claim damages under the anti-trust laws for injury caused

by their elimination from the Canadian market when it is shown that two other American companies had entered into a conspiracy to eliminate all competition and to monopolize the industry and when it is shown that as part of this conspiracy one of the American companies utilized its domination and control over a wholly owned Canadian subsidiary, which had been given a discretionary power by the Canadian government to allocate the importation of vanadium into Canada during the war, to exclude the exports of petitioners (competitors) from entering Canada for sale to petitioners' Canadian customers and when it is shown that the refusal of the Canadian subsidiary to allocate vanadium to petitioners' Canadian customers was directed by its American parent company pursuant to the overall conspiracy to eliminate all competition and specifically to eliminate petitioners. This issue was erroneously decided against petitioners on the Court of Appeals' manifest misapplication of this Court's recent opinion in *Eastern Railroad Pres. Conf. v. Noerr Motor Frgt., Inc.* (1961) 365 U.S. 127, 81 S.Ct. 523.

6. Whether petitioners, against whom a directed verdict was ordered by the Appellate Court, were deprived of a trial by jury by the Appellate Court below which weighed the evidence, made factual rulings on the sufficiency of evidence of causation, did not view the evidence as a whole, did not allow petitioners the benefit of all their evidence, did not allow petitioners the benefit of all inferences and presumptions to be drawn from the evidence and did not resolve all conflicts in the evidence in favor of petitioners in direct conflict with this Court's opinion in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

7. Whether the Seventh Amendment to the United States Constitution prevents a Federal Appellate Court from reviewing the facts determinable by a jury when the trial Court permitted the case to be submitted to the jury and the factual question of the sufficiency of the evidence on the question of causation was not raised by appeal or by a cross-appeal and when there has been no compliance with Rule 50(b) of the Federal Rules of Civil Procedure by the party seeking to have the Appellate Court review the sufficiency of the evidence to support a finding?

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2; Section 4 of the Clayton Act, 15 U.S.C. 15, and 28 U.S.C., section 2072, Fed. Rules of Civ. Proc. 50(b). The constitutional provision involved is the Seventh Amendment of the Constitution of the United States. These are printed and attached to this Petition as Appendix D.

STATEMENT OF THE CASE

A. Summary Statement

This was an action filed by petitioners to recover treble damages under the Sherman Act. Petitioners were distributors and agents in the alloy metals business. The complaint alleges that respondents conspired to monopolize and did monopolize the vanadium industry and that, as a result of these violations of the anti-trust laws, petitioners were eliminated from the vanadium industry. Peti-

tioners claimed they could not continue to operate profitably because of the dominant position respondents had acquired in the industry as a result of their monopolization of raw materials, their joint refusal to sell supplies to petitioners for processing in their own plants or to manufacturing associates with whom petitioners had made manufacturing arrangements, their intentional elimination of petitioners from the Canadian market pursuant to the conspiracy between respondents, and their threats of commercial reprisals to manufacturing associates of petitioners for persisting in the industry. (Complaint, Par. 39, Tr. 21.)

The complaint was filed on July 15, 1949. (Tr. 3-25.) The trial by jury commenced on June 2, 1958. On June 24, 1958 the jury returned a verdict in favor of respondents. (Tr. 104.) Judgment was entered on the verdict. (Tr. 104-105.)

After entry of judgment, neither of the parties moved for any type of ruling under the provisions of Rule 50(b) of the Federal Rules of Civil Procedure.

Petitioners duly appealed to the United States Court of Appeals for the Ninth Circuit. Petitioners' Statement of Points on Appeal appears at page 2058 of the transcript. Neither party designated the complete record. (Tr. 2064-2068.) For example, respondents' motions for dismissal at the close of petitioners' case are not printed (Tr. 1271, 1989) but the motions for a directed verdict are reported (Tr. 1989).

In their specifications of error, petitioners complained to the Court of Appeals that, during the trial, petitioners sustained prejudicial hostility to their lawsuit and to the

Sherman Act in general and that the trial Court made repeated rulings on the law and the evidence manifestly erroneous and prejudicial to them.[1]

Respondents did not cross-appeal.

In its opinion, the Court of Appeals for the Ninth Circuit held as a *matter of law* that even assuming that petitioners had proved a conspiracy to monopolize the vanadium industry resulting in a 100% control of the manufacture of ferrovanadium and a 90% to 95% control of the manufacture of vanadium oxide by respondents, and had proved their [petitioners'] inability to successfully maintain themselves in the vanadium industry, the trial Court erred in submitting the case to the jury because petitioners had not proved causation. The Court below based this holding on its conclusion that petitioners had not proved that respondents eliminated all petitioners' sources of supply and had not proved an absolute and unqualified inability to obtain vanadium oxide from respondents. (Opinion, Appendix A.) The Court below made this ruling in the face of confessions by top executive officers of respondents that respondents had as their goal the elimination of all competition in general (Tr. 208-209), and the elimination of petitioners in particular (Tr. 546-547, 222-226, 611).[2]

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[1]The errors raised on appeal by petitioners are set forth at Appendix F to this Petition.

[2]In this respect, it is to be noted that actions were brought by independent miners and millers in the District Court of the State of Utah, based on the same conspiracy involved herein. In those cases, a jury found against respondents and assessed damages on behalf of plaintiffs. There the trial Court admitted the evidence as to conspiracy rejected by the trial Court in the instant case. These cases are presently before the United States Court of Appeals for the Tenth Circuit.

In so ruling, we respectfully submit that the Court below deprived petitioners of their rights under Section 4 of the Clayton Act and the Seventh Amendment to the United States Constitution.

In order to state the facts necessary to show the more than abundant evidence which precluded the result reached by the Court below and the serious errors which the Court below refused to face, it will be necessary to state the facts in some detail.

B. Rulings of the Trial Court

The complaint filed herein alleged a conspiracy by respondents to monopolize the vanadium industry, monopolization of the vanadium industry and the elimination of petitioners from the vanadium industry. (Tr. 16.) The complaint alleged that this conspiracy was formed in 1933, continued up to the date of the filing of the complaint and was the cause of the petitioners' elimination from the vanadium industry. (Tr. 13, 16-24.) The complaint specifically alleged that respondents intended to eliminate all independent producers and distributors of ferrovanadium and vanadium oxide from the vanadium industry and that petitioners were one of the companies eliminated as a result of this conspiracy and monopolization. (Par. 30, Tr. 16; Par. 45, Tr. 23-24.)

During the trial, the trial Court did the following:

(a) Rejected as inadmissible all evidence and testimony offered by the petitioners to show the terms, origin, nature, purpose and scope of the conspiracy and combination of the respondents from 1933, the year in which petitioners alleged the conspiracy was formed, to 1938

on the grounds that petitioners entered this country in 1938. (Tr. 112-113, 118-119; Offer of Proof, Tr. 308-327; 422-434; 151-152, 194; 256-268; 601-603; 1985-1986.)

(b) Rejected all evidence pertaining to the suppression of petitioners' Canadian business by respondents as part of the conspiracy and the exclusion of petitioners from Canadian Markets (Tr. 801-808; 831-838; Offer of Proof, Tr. 801-840);

(c) Rejected as inadmissible evidence that respondent Union Carbide informed petitioners that they had no business in the vanadium industry, threatened petitioners to stay away from Climax Molybdenum Co., a manufacturing associate of petitioner which produced petitioners' product, or reprisals would be taken against Climax (Tr. 813-818; 826-834; 845-851; 1008-1012);

(d) Excluded evidence offered by petitioners as to their overall business success and their ability to succeed in other allied fields of ores, minerals and alloys (Pls.' Ex. 121 for Id., Tr. 1083-1088; Pls.' Ex. 123 for Id., Tr. 1096-1097; Pls.' Ex. 124 for Id., Tr. 1097-1103; Pls.' Ex. 125 for Id., Tr. 1103-1106; Pls. 126 for Id., Tr. 1106-1107; Pls.' Exs. 139-141 for Id., Tr. 1261-1266);

(e) Persistently told the jury that activities in prima facie violation of the antitrust laws were "good business judgment", a "good proposition", and not "improper". (Tr. 209, 245, 246, 558, 561, 586.) In effect, these statements amounted to an instruction to the jury that good business judgment was an absolute defense to Sherman Act violations. (Tr. 1909-1910; 245, 246, 255, 256, 561, 563, 586, 611, 869, 1647, 1709, 1833.) This error was magnified in the instructions when the Court instructed the jury that

"... You cannot find that the defendants entered into an unlawful agreement or conspiracy because you disagree with their business judgment." (Tr. 2029.) The trial Court failed to qualify its instructions on individual business judgment (Tr. 2028-2029);

(f) Instructed the jury on the public injury doctrine specifically rejected by this Court in *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656, 81 S. Ct. 365 (1961). (Tr. 2035-2036.) In fact, the "public injury" instruction offered by respondents and given by the trial court specifically cited the Ninth Circuit *Klor's* decision which this Court unanimously overruled;

(g) Erroneously instructed the jury that any acts of the respondents as agents of the Government, American or Canadian, could not be considered by the jury as part of the illegal agreement, plan or monopolization herein involved (Tr. 2033);

(h) Required petitioners to prove damages to a reasonable certainty and to prove that, but for the conspiracy, petitioners would have had vanadium products to sell and would have sold them at a profit. (Tr. 2032.) In so doing the trial Court in complete seriousness stated "But somebody has to start reversing the Supreme Court." (Tr. 2011.)[3]

[3]Mr. Alioto. I would suggest this, if your Honor please; it has been done in other cases, and we have done it pretty usually in our proposed instructions: Just take that instruction from the *Bigelow* case and give it directly and verbatim. No one can object to the language of Justice Stone .... The Court: Yes. But somebody has to start reversing the Supreme Court. (Tr. 2011.)

(i) Refused to instruct the jury that a conspiracy to refuse to deal was per se illegal (Tr. 2031);

(j) Repeatedly questioned the materiality and import of petitioners' evidence (Tr. 221, 249, 325, 599, 751, 753, 1323, 1324, 1581, 1603, 1621, 1644, 1646, 1656, 1801, 1909-1911, 1924, 1979, 1984), and, to petitioners' prejudice, continuously minimized and questioned the weight and credibility of petitioners' evidence and witnesses. (Tr. 560, 561, *1413-1414*, 1422, 1581, 1804, 1904, 1910, 1962-1963.) By its unwarranted interference in these respects, the trial Court prevented petitioners from making a full, orderly and fair presentation of their case, and gave the jury an impression that their decision should be for respondents.

(k) Permitted counsel for respondent VCA to inform the jury in his opening statement that these same respondents had been acquitted in a prior government suit based on these same facts. (Tr. 111.)

On two separate occasions during the trial, respondents moved for a dismissal and a directed verdict on the grounds of insufficiency of the evidence. (Tr. 1989.) The first of these motions was made after petitioners had presented their case. The motions were renewed after respondents rested. The motions for dismissal and directed verdict were not printed in the record; however, reference is made to them at page 1989 of the Transcript. The trial Court reserved its rulings on these motions on both occasions and, without ruling on them at any time, submitted the case to the jury, which returned a verdict in favor of respondents.

C. Evidence on the Issue of Causation

1. Monopoly Control of the Vanadium Industry

The business of milling, manufacturing and selling vanadium products[4] was completely controlled and dominated by respondents, the Union Carbide and Carbon Corporation, (herein called Union Carbide), its divisions or subsidiaries, and the Vanadium Corporation of America (herein called VCA). The Union Carbide divisions or subsidiaries involved in this case were the United States Vanadium Corporation, (herein called USV); Electro Metallurgical Company, (herein called Electromet); Electro Metallurgical Sales Corporation, (herein called Electromet Sales); Electro Metallurgical Company of Canada, Ltd., (herein called Electromet of Canada). All

[4] Vanadium is a rare metallic element found in the United States on the Colorado Plateau, a geographical unit formed by the western part of Colorado, the eastern part of Utah and the northern parts of New Mexico and Arizona. The vanadium-bearing ore is first mined, then converted into vanadium oxide at mill sites located near the ore deposits. These mills crush, roast and leach the ore to produce a substance known as "red cake". This red cake is then fused into a black oxide, which is interchangeably called vanadium oxide, vanadic acid, vanadium pentoxide or V_2O_5. (Tr. 166-169.) This oxide is then converted into ferrovanadium, a ferro-alloy, through the application of great heat either by means of an electric furnace or by an alumino-thermic process. Respondents utilized the electric furnace process of conversion. (Tr. 170-171, 1827-1828.) Petitioners utilized the alumino-thermic process, a process which is much cheaper and does not require large and expensive investments in electric furnaces. (Id., Tr. 841-842.)

The vanadium oxide produced at the mill sites on the Colorado Plateau is shipped to electric furnace plants, located in the East, for conversion to ferrovanadium. (Pls.' Ex. 6, Tr. 2069-2072.)

The major customers for vanadium products are the steel companies, which use the ferrovanadium in the steel bath to add toughness and tensile and torsional strength to the steel. (Tr. 1523-1529.) Vanadium steels are used in the manufacture of high speed tools, machine and automobile parts, and in armor plate. (Id.)

the above mentioned companies except VCA are either divisions or wholly owned subsidiaries of Union Carbide. VCA is an independent corporation.

Except for the competition offered by petitioners during their existence, at all times mentioned herein, VCA and Union Carbide maintained a 100% control of the manufacture and sale of ferrovanadium (Pls.' Ex. 138, Tr. 1938-1947; 1402-1403; 1843-1844), and more than a 90% control of the manufacture and sale of vanadium oxide (Pls.' Exs. 136-137, Tr. 1938-1945; 1844-1845). USV alone produced and sold more than 77.2% of the vanadium oxide manufactured and sold in the United States. (Id.) VCA produced 64.7% of the total production of ferrovanadium. (Pls.' Ex. 138, Tr. 1938-1947.)

By 1940, USV alone held more than a 90% control of all easily accessible ore bodies on the Colorado Plateau. (Tr. 506.)

2. The Parties

(a) Union Carbide

Union Carbide is a New York corporation which holds ownership of corporations engaged in the manufacture, distribution and sale of ferro-alloys. (Tr. 153, 164-166.)[5] USV is the wholly owned Union Carbide subsidiary which was engaged in the business of mining and milling vanadium ores on the Colorado Plateau. (Tr. 27, Pls.' Ex. 6, Tr. 2071.)

In Canada, Union Carbide wholly owned the Electro Metallurgical Company of Canada, Ltd., a corporation

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[5]The Union Carbide divisions or subsidiaries involved herein are set forth in Section C1 of this Petition at pages 12 and 13.

organized and existing under the laws of Canada. (Tr. 27-28, 819-820.) Union Carbide sold vanadium products in Canada through this Canadian subsidiary.

Union Carbide or its subsidiaries were the only major domestic producers of vanadium oxide on the Colorado Plateau until about 1940. (Pls.' Ex. 18, Tr. 124-127.) In 1927, Union Carbide had acquired the properties of the United States Vanadium Corporation, located at Rifle Colorado and entered the vanadium business. (Pls.' Ex. 6, Tr. 2070.) In 1936, it erected a mill at Uravan, Colorado. (Id.) From 1942 to January, 1944, it operated the vanadium mill at Durango, Colorado, as agent for the Metals Reserve Company, a governmental agency which appointed USV its agent for the war time procurement of vanadium. (Df. U's Ex. B, Tr. 2358; Tr. 368-381.) USV acquired the Durango mill from the United States Government in July 31, 1944, and operated it until June 2, 1948. (Pls.' Ex. 6, Tr. 2071.) In 1942, USV also erected another mill at Rifle, Colorado. (Tr. 2070.)

(b) Vanadium Corporation of America

From 1927 to 1940, VCA's principal source of vanadium bearing ores was a Peruvian mine where it also operated a mill. (Tr. 2072.) In 1932, VCA acquired the assets of the Rare Metals Corporation for $428,000. (Tr. 2069-2070.) These assets included a vanadium mill located at Naturita, Colorado. (Tr. 2069-2070.) Although it acquired the Naturita mill in 1932, the mill was not rehabilitated until 1939 and was not put into active operation until the middle of 1940. (Tr. 1827, 2070.) From 1932 to 1940 VCA relied on USV for its domestic source of vana-

dium oxide. (Pls.' Ex. 8, Tr. 2074, Pls.' Exs. 43, 44, 45, Tr. 2122-2126.)

From September, 1942, until February 29, 1944, VCA operated a mill located at Monticello, Utah, for the Defense Plant Corporation. This Monticello plant was erected and planned by VCA officials at government expense. (Tr. 1836.) VCA leased the plant during 1945 and the spring of 1946. (Tr. 2072.) In 1948, VCA acquired the Durango Mill. (Tr. 1827, 2072.)

During the periods in question, respondents milled millions of pounds of vanadium oxide, which constituted more than 90% of the total domestic production. From this oxide respondents produced millions of pounds of ferrovanadium per year. Except for petitioners' challenge to this monopoly, this production constituted 100% of the total domestic production of ferrovanadium. (Pls.' Exs. 1, 2, 3, 18, Tr. 113, 114, 127.)

(c) Petitioners

Petitioners were a family partnership and successors to the Continental Ore Corporation, hereinafter called Continental. Mr. Henry J. Leir was "the guiding light" in Continental in 1938. He came to this country from Europe in 1938 and brought with him an extensive and practical knowledge, background and experience in ores, metals, and alloys. (Tr. 1034-1047.) Mr. Leir had an extensive background in Europe in the vanadium industry, having successfully developed the inexpensive alumino-thermic process of converting oxide to ferrovanadium. (Tr. 1043, 1063.)

After his arrival in this country, Mr. Leir challenged respondents' monopoly position by attempting to enter the vanadium industry. He contacted the Apex Smelting Company of Chicago, Illinois, a maker of aluminum, hereinafter referred to as "Apex" and entered into an agreement with Apex whereby Apex would produce ferrovanadium for petitioners and petitioners would be the agents for Apex, procure the supplies of vanadium oxide necessary to permit Apex to manufacture ferrovanadium and then sell the finished Apex ferrovanadium production. (Tr. 1059; Pls.' Ex. 117, Tr. 2187-2189.)

Apex commenced producing ferrovanadium in August or September, 1940, and continued to produce ferrovanadium until October, 1941. (Tr. 1062.) A fire suspended operations for a time (Tr. 1154), but in January 27, 1942, Apex notified Mr. Leir that Apex was terminating its contract with petitioners (Df. V's Exs. I-Y, Tr. 1173-1175). Apex terminated production in July, 1942. (Pls.' Ex. 122, Tr. 2218-2220.)

Thereafter, petitioners installed a grinder and mixer in a warehouse located on Long Island, New York, and from 1942 to 1944 they attempted to distribute their product Van-Ex, a product which they had developed at lower cost and which could be used in place of ferrovanadium. (Tr. 840-845, 860; see Pls.' Ex. 119, Tr. 2212; Tr. 989.)

On February 10, 1943, petitioners and the Climax Molybdenum Corporation of Langeloth, Pennsylvania, hereinafter referred to as "Climax", entered into a contract for the conversion of 20,000 pounds of vanadium oxide into ferrovanadium. (Pls.' Ex. 111, Tr. 1016-1018;

and see Tr. 942-961.) Climax terminated the arrangement when it was threatened with commercial reprisals if it persisted in the industry by respondent Union Carbide. (Tr. 829.)

In the Spring of 1944, petitioners and the Imperial Paper and Color Corporation, hereinafter referred to as "Imperial", entered into a contract whereby Imperial agreed to process ferrovanadium and vanadium oxide for petitioners and petitioners undertook to secure the necessary raw materials for Imperial and to act as its sales agent for Imperial's entire output. (Pls.' Ex. 110, Tr. 2175-2178.) Imperial was compelled to abandon this arrangement because of its inability to secure adequate vanadium supplies. (Pls.' Exs. 114, 115, Tr. 1022-1024, 2179-2182.)

As part of their vanadium business, petitioners had developed an extensive foreign business with a large Canadian steel mill, the Atlas Steels Limited. In 1942, petitioners shipped Van-Ex to them from their Long Island plant. (Tr. 802.) At the trial petitioners offered to prove that in 1943 they were prevented from shipping to their Canadian customers and the Canadian market by Electromet of Canada, Union Carbide's wholly owned Canadian subsidiary, pursuant to the basic conspiracy to eliminate petitioners and all other competitors but VCA from the vanadium industry. (Pls.' Exs. for Id. 80-108, Tr. 801-840; Testimony of Mr. Wolf, Tr. 813-817; 832-834; 845-851; 1008-1012.) This evidence was excluded by the trial Court. (Tr. 801-851.)

By the end of 1945, petitioners were no longer in the vanadium industry. Petitioners' billings and sales are

shown in Pls.' Exs. 119, 120. (Tr. 2212-2213.) In 1941 and 1942 alone, petitioners sold over $200,000 in vanadium products. (Tr. 2212.)

Mr. Leir was exceptionally successful in all the other fields of ores, alloys and minerals. (Pls.' Exs. 123-126 for Id., Tr. 1097-1114.) The only field of endeavor in which he was not able to become established and to succeed was the vanadium business. (Tr. 971-980, 1097-1114, 2212.) From this business he was totally excluded. Only extensive and exhaustive efforts on the part of petitioners allowed them to remain in the vanadium industry from 1938 to 1945. (Id.) However, by 1945, respondents' conspiracy to monopolize the vanadium industry and eliminate all competition had succeeded in eliminating petitioners from the market place.

D. Proved Violations of the Sherman Act

1. Direct Evidence Was Introduced at the Trial That Respondents Had as Their Purpose and Intent the Exclusion of All Independent and Potential Sources of Supply for Petitioners

There was uncontradicted direct evidence introduced at the trial that respondents conspired to monopolize the production of vanadium products and specifically intended to eliminate petitioners from the vanadium industry. Mr. Blair Burwell, a Vice President of USV and a member of its Board of Directors (Tr. 135-138) gave direct testimony that he was specifically instructed by his superiors to acquire all properties on the Colorado Plateau that could possibly produce vanadium in competition with USV in order to keep them off the American market. (Tr. 209.) Seldom, if ever, has there been a confession of such

flagrant antitrust violations by an executive of an offending company. Mr. Burwell gave the following testimony:

"Q. State whether or not there was, in September of 1938, a communication from any superior of yours in the United States Vanadium Corporation or Union Carbide with respect to a policy on competitive activities on the Colorado Plateau.

A. Yes, there was.

Q. Was this an oral or a written communication to you?

A. Oral.

Q. And who gave you that oral communication?

A. Mr. Van Fleet.

Q. What was the policy as communicated to you?

A. Well, I was—my instructions were to acquire all the properties on the Colorado Plateau that would possibly produce vanadium in competition with the United States Vanadium Corporation.

Q. To acquire them for what reason?

A. To keep them off the market as producers of vanadium.

Q. What market?

A. The American market."

(Burwell, Tr. 208-209.)

Burwell gave detailed direct testimony as to USV's acquisition or elimination of all independent sources of vanadium oxide to which petitioners could look or depend upon for their raw materials. The independent sources of supply which were specifically eliminated by respondents to keep them out of the American market were:

(a) *Anaconda Copper Company:* USV purchased its production of approximately 100,000 pounds of V_2O_5 per year. (Tr. 206-207.) Burwell testified USV did not need

this oxide at this time (September, 1938), but that USV purchased the Anaconda production only to "keep it off the market", "the American market". (Tr. 207.)

(b) *Gateway Alloys:* These mines were unnecessarily and brutally stripped of easily accessible ore by USV because "we wanted to keep another vanadium operation from getting started". (Tr. 292-293.)

(c) *Mesa Vanadium Mill:* The entire mill was acquired by USV "to keep it out of production". (Tr. 303.) USV did not need a mill at this time. (Tr. 303.)

(d) *Loma Mill:* Prior to the time this independent mill was opened, USV was not purchasing ore in the area of the Loma Mill. After the mill was opened as an independent mill, USV started an ore buying station near the mill to keep the ore "away from this mill". (Tr. 303-306.) The mill closed for lack of ore. (Tr. 306.) This ore was hauled a distance of 150 miles to keep it away from independents. (Tr. 306.)

(e) *The Durango Mill:* This mill was acquired by USV in 1944 because "we wanted to keep control of the production of vanadium" (Tr. 246-247) and because some independents were trying to buy it (Tr. 242). USV feared these independent producers would use this mill to start an independent production of oxide in competition with USV. (Pls.' Ex. 38, Tr. 244, 2119.)

(f) *Nisley & Wilson Mill:* Mr. Nisley, one of the owners of the mill, testified that Burwell actually took miners off his scales and offered them premium prices to haul their ore a great distance to USV's mill at Uravan. (Tr. 655-656.) The mill closed. (Tr. 658-663.) After Nisley was caused to close his mill he sought MRC aid and was

referred to Burwell, USV agent for MRC, who told him that the only condition under which Nisley would be supplied ore purchased by MRC for the government account was that the oxide produced from the ore be returned to USV. (Tr. 660-663.) USV, as agent for MRC, subsequently terminated its contract with Nisley sooner than it terminated its contract with VCA. (Tr. 666.)

Mr. Burwell also testified that there was an agreement between Union Carbide and VCA which required Electromet to follow VCA prices against the business judgment of officers of USV. (Tr. 145-157, 193-194, 229-241.)

Respondents' letters and correspondence showed the most intimate collaboration between respondents. For example in November, 1938, Electromet Sales sold VCA 130,000 pounds of vanadium oxide at 80¢ a pound, which was 30¢ below respondents' identical contract prices of $1.10. (Pls. Exs. 4, 10, Tr. 114, 119-120.) And as a result of the so-called "Maggie C." Agreement entered into between Union Carbide and VCA, USV mined ore from claims owned by VCA, milled these ores into vanadium oxide at its own mills at the price of 65¢ per pound in 1939 and 75¢ per pound during 1940 for delivery to VCA. (Pls.' Ex. 8, Tr. 2074; Pls.' Exs. 43, 44, 45, Tr. 279-280, 2122-2126.) Under this arrangement, during 1939 and 1940, 717,848 pounds of vanadium oxide were delivered by USV to its "competitor" VCA. (Pls.' Ex. 149, Tr. 1573, 2305.)

On September 26, 1941, respondents entered the "Dry Valley Agreement". (Pls.' Ex. 46, Tr. 2128-2133.) Under this agreement, USV deeded valuable Dry Valley claims to its "competitor" VCA. (Id.)

Burwell also testified that he and Mr. Bransome, President of VCA, fixed ore prices (Tr. 211-218, 496-500) and that Union Carbide and VCA had customer division arrangements whereby customers were allocated between USV and VCA (Tr. 248-256).

Mr. Burwell's testimony on the policy of excluding all existing and potential competition to Union Carbide and VCA was corroborated by the contemporaneous documents. (Pls.' Ex. 33, Tr. 174-177; Pls.' Ex. 34, Tr. 199-206; Pls.' Ex. 35, Tr. 219, 2114; Pls.' Ex. 36, Tr. 228; Pls.' Ex. 37, Tr. 243; Pls.' Ex. 64, Tr. 2147.)

The trial Court excluded *all* correspondence and interoffice memoranda between the respondents, dated 1933 to 1938, which would have established conclusively the terms, origin, nature and purpose of the conspiracy agreement between respondents for the joint control of the vanadium industry. (Offer of Proof, Tr. 422-433; Pls.' Ex. for Id. 25, Tr. 118-119, 134; Pls.' Ex. 47, Tr. 308-316; Pls.' Exs. 48-54,[6] Tr. 318-323; Pls.' Ex. 67 A to F, Tr. 601-603, 626-627.) Petitioners claimed that the conspiracy involved in this law suit was formed in 1933 and continued until after 1938. Thus petitioners were prevented by the Court's ruling on the so-called "pre-1938" documents from introducing any evidence which would establish the terms of the agreement between respondents and from proving the specific acts which took place under said agreement from 1933 to 1938. This evidence certainly was probative on the issue of causation, i.e. whether petitioners were injured by respondents' conspiracy and violations of the anti-

[6]As an example of the type of evidence excluded by the trial Court, a copy of Pls.' Ex. 51 for Id. is attached hereto as Appendix E.

trust laws or whether petitioners' demise was caused by acts having no relation to the conspiracy.

2. There Was Direct Evidence Introduced at the Trial That Respondents Intended to Exclude Respondents' Only Competitor in Ferrovanadium, Petitioners, and Their Manufacturing Associates, From the Vanadium Industry

Mr. Burwell, in testifying on the refusal of Union Carbide to supply petitioners with vanadium oxide in November, 1943, stated that the **ONLY** reason petitioners could not obtain vanadium oxide from Union Carbide was that Union Carbide, pursuant to its conspiracy with VCA, wanted petitioners out of the vanadium business. He testified:

> "Q. (By Mr. Alioto). Did you know at that time that Mr. Leir, or the Continental Ore Company, were trying to buy—was trying to buy vanadium oxide from your company?
>
> A. Oh, yes, I heard that at that time.
>
> Q. Do you know why they would not sell it to them?
>
> A. Well, I heard exactly that they did not want to sell vanadium to Mr. Leir because they wanted to keep him out of the vanadium business. *No other reason.*" (Tr. 547; emphasis added.)

Mr. Burwell further testified that Mr. Bransome, President of VCA, told him in 1948 that VCA did not want Leir back in the vanadium business. (Tr. 222-226.) Mr. Burwell testified that Mr. Bransome told him:

> "That would put Mr. Leir in the vanadium business and that is what we are trying to keep him out of." (Tr. 226.)

Mr. Burwell further testified that it was the corporate policy of Union Carbide to keep Leir out of the vanadium business:

"Q. Now, you testified, did you not, that you heard that Union Carbide did not want to sell vanadium to Mr. Leir because they wanted to keep him out of the vanadium business?

A. That's right.

Q. Now, who told you this, Mr. Burwell?

A. Oh, I heard that from Mr. Van Vleet, I heard that from—I heard that in a dozen conferences. I don't recall exactly which one—in the building, 30 East 42nd Street, New York City.

Q. Sort of rumor?

A. It was my business to be in those meetings. They weren't formal meetings. I heard it from Mr. Van Fleet, I heard the references to Mr. Leir—I had never met Mr. Leir—I knew nothing of his business excepting it came up second-handed—I heard from Mr. Jacobi.

Q. (By the Court.) Did any of these corporations, now, that you were connected with, make an order, a formal order on policy to that effect, that you know of?

A. No, your Honor. No smart lawyer would let a corporation make a formal order in writing of that kind of thing. One of our instructions was never to write anything down like that." (Tr. 611.)

3. There Was Direct Evidence Introduced at the Trial or Offers of Proof Which Were Erroneously Excluded by the Trial Court That Respondents Directly Interfered With Petitioners' Manufacturing Associates

(a) Petitioners Proved That VCA Interfered With Petitioners' Relationship With Apex Smelting Co. in Order to Keep Petitioner Out of the Vanadium Business

Evidence introduced by Petitioners proved or tended to prove that while Apex was still a manufacturing associate of petitioners, officials of VCA and Apex had secret

negotiations which culminated in an agreement whereby Apex was to stay out of the vanadium business, furnish VCA with Petitioners' list of suppliers and, in return, VCA would purchase 150,000 to 200,000 pounds of dioxiding aluminum ingots from Apex over a period of six or seven months for $10,250-$27,000. (Pls.' Ex. 62, Tr. 2144; Tr. 1335-1337, 1947-1949.)[7] Apex subsequently terminated its association with petitioners even though Mr. Leir requested Apex to resume production again. (Df. V.'s Ex. 2-C, Tr. 1194-1196.)

(b) Evidence That Union Carbide Threatened Reprisals Against Climax Molybdenum Co. If Climax Maintained Its Association With Petitioners Was Erroneously Excluded

Petitioners made an offer of proof to prove through Mr. Martin Wolf, petitioners' Vice-President, that Union Carbide threatened reprisals against the Climax Molybdenum Co., another manufacturing associate of petitioners if Climax continued negotiations with petitioners and persisted in the vanadium business. This evidence was excluded by the trial Court.

The offer of proof, in part, as stated by counsel for petitioners to the trial Court, was as follows:

> "Mr. Arrouet said further that the plaintiff, the Continental Ore Company, had no business in the vanadium business. Mr. Arrouet said further to the plaintiff that they had better stay away from Climax and not try to make any arrangements with Climax, and they were then entering negotiations with them, as the offer of this evidence will tend to show.

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[7]Pls' Ex. 62, evidence of this transaction, is attached hereto as Appendix E.

"Mr. Arrouet told them to stay away from Climax, and, if Climax got into the business, that Union Carbide would undertake a reprisal against the Climax Molybdenum Company.

"He said, in that connection, that Union Carbide had available at its plant in California, its tungsten operation in California, quantities of molybdenum that they would use against the Climax Molybdenum Company if that company entered into negotiations with the plaintiff to manufacture ferrovanadium for the account of the plaintiff or under a joint operating arrangement with the plaintiff.

"At that juncture this witness, we offer to prove, that this witness said, in substance or effect, 'Does it mean, then, Mr. Arrouet, that the picture of the world is something like this: God told Electromet to make vanadium, tungsten, ferro-manganese and God told Vanadium Corporation to make ferrovanadium and that nobody else would be allowed into these fields?' To which the employee of Electromet Company and the Union Carbide affiliate answered: 'That was just about it.' And 'That's the way it was going to be.'" (Tr. 828-829.)

(c) Respondents Uniformly and Jointly Refused to Supply Petitioners With Vanadium Oxide in November, 1943, so as to Interfere With Petitioners' Manufacturing Association With Imperial

In November, 1943, petitioners made requests to both Electromet Sales and VCA for monthly supplies of oxide. (Wolf, Tr. 1012-1013; Burwell, Tr. 546-547; Pls.' Exs. 40, 41, 42, Tr. 268-273.) These requests were jointly refused. The evidence very specifically showed that petitioners made these requests for vanadium oxide from the respondents in November, 1943, in order to supply their manu-

facturing associate, the Imperial Paper and Color Corp., with vanadium oxide. This supply of vanadium oxide would have permitted Imperial to start production of ferrovanadium under a contract which petitioners were negotiating with Imperial, which petitioners were positive they could make (Tr. 1013), and which *was* eventually made (Pls. Ex. 110, Tr. 2175). Mr. Wolf testified:

"Q. (By Mr. Alioto) Now, Mr. Wolf, you were with Continental Ore Company in November of 1943, were you not?

A. That's correct.

Q. And you were with them at the time that the request was made in November to both Electro Metallurgical Sales Corporation and Vanadium Corporation of America to supply you with regular monthly supplies of vanadium oxide?

A. That's correct.

Q. Now, what was the situation in November of 1943 with respect to contractual arrangements with any proposed manufacture of ferrovanadium? Did you have any at that time?

A. In November of '43?

Q. Yes.

A. We had a contract with Imperial Paper.

Q. Well, I think your dates may be a little awry, but to establish those definite dates on matters on which both——

Mr. Archer. That's January, 1944, whatever the date is. We can develop that.

A. We had negotiations at that time which we were sure would lead to a contract with Imperial Paper, so we were trying to,——

Q. (By Mr. Alioto) All right. The contract was actually made in January of 1944, is that correct?

A. Yes. But we were trying to get a basis of raw materials for our negotiations for the forthcoming contract." (Tr. 1012-1013.)

The specific reason for respondents' refusal to supply petitioners *at this exact time* was that Union Carbide desired to exclude them from the industry. (Burwell, Tr. 546-547.) Burwell testified that Electromet did not sell oxide to petitioners [Leir] at this very time because respondents wanted "to keep him out of the vanadium business". (Burwell, Tr. 547.)

(d) Respondents Acquired Government Mills Not Needed by Them to Prevent Independent Operators From Acquiring Them

In November, 1943, following the end of the vanadium stockpile program, respondents moved to prevent independent operators from acquiring the government subsidized mills and, thereby, gain a toehold in the vanadium business. Accordingly, VCA leased the Monticello Plant from the Defense Plant Corporation (Pls.' Ex. 6, Tr. 2070), and USV acquired the Durango Plant at a cost of approximately $75,000 (Pls.' Ex. 38, Tr. 2119). Mr. Burwell testified that USV acquired the Durango Mill because USV "wanted to keep control of the production of vanadium" (Tr. 241-247) and because some independents were trying to buy it (Tr. 242). In so doing they thwarted Mr. Leir's plans to form an independent cooperative association of miners and millers. (Df. V's Exs. 2-K-L, Tr. 2533-2554; 1774-1780.)

4. During the Period 1938 to 1946, Respondents Refused to Deal With the Petitioners, and Thereby Deprived Petitioners Access to Over 90% of the Industry's Supply of Vanadium Oxide

Petitioners or their associate Apex made the following requests for vanadium oxide from respondents:

Date	Request	Action by Respondents
July 28, 1939[1]	10,000 lbs. a year from VCA	No response
Oct. 17, 1939[2]	5,000 lbs. oxide from VCA	Refused[3]
Oct. 17, 1939[4]	4,000 lbs. ferro-vanadium from VCA	Refused[5]
March, 1940[6]	Vanadium Oxide from VCA	Refused[7]
Oct. 17, 1940[8]	Oxide from Electromet	Refused[9]
June 14, 1941[10]	Vanadic Oxide from Electromet	No response[11]
June 16, 1941[12]	That Petitioners be allowed to convert oxide for VCA	No response
June 16, 1941[13]	That Petitioners be allowed to convert oxide for Electromet	Rejected[13]
July 16, 1941[14]	Through OPM, Vanadium Section, Petitioners asked for oxide from VCA	Refused
July 16, 1941[15]	Through OPM, Vanadium Section, Petitioners asked for oxide from Electromet	Refused
May 21, 1943[16]	That Electromet fill Continental's oxide requirements for the remainder of the year	Unable to accept[16]
Nov. 16, 1943[17]	10,000 to 15,000 lbs. Vanadium oxide from VCA per month, any fixed length of time	Refused[17]
Nov. 17, 1943[18]	10,000 to 15,000 lbs. Vanadium oxide from Electromet per month, any fixed length of time	Refused[18]

[1] Pls.' Ex. 132, Tr. 2258.
[2] Pls.' Ex. 132, Tr. 2259-2260.
[3] Pls.' Ex. 132, Tr. 2260.
[4] Pls.' Ex. 132, Tr. 2259-2260.
[5] Pls.' Ex. 132, Tr. 2260.
[6-7] Pls.' Ex. 63, Tr. 779-780.
[8-9] Pls.' Ex. 128 (not printed); See Df. V's Ex. 1-N, Tr. 2506.
[10-11] Pls.' Ex. 77; Tr. 776.
[12] Pls.' Ex. 132, Tr. 2261-2262.
[13] Pls.' Ex. 77, Tr. 776-778.
[14] Pls.' Ex. 132, Tr. 2265.
[15] Pls.' Ex. 132, Tr. 2265.
[16] Df. U's Ex. 4-M, Tr. 955, Df. U's Ex. 4-N, Tr. 957.
[17] Pls.' Ex. 40, Tr. 271, Pls.' Ex. 41, Tr. 271-272.
[18] Pls.' Ex. 42, Tr. 272-273.

Since respondents controlled over 90% of the existing supplies of vanadium oxide (Tr. 1844-1845, Pls.' Exs. 136-137 (not printed), Tr. 1254-1256), these refusals constituted a withholding from petitioners by respondents of the only source of a steady, dependable and active supply of oxide necessary to support a vanadium business.

5. There Was Direct and Circumstantial Evidence Introduced at the Trial That Respondents Directly Thwarted Petitioners' Independent Supplies of Vanadium Oxide

(a) The Nisley and Wilson Mill

Mr. Nisley, owner of the Nisley & Wilson Mill, testified that respondents caused him to close his independent mill in October, 1942, and to cancel his relations with petitioners. (Tr. 654-658.) From October, 1942, to April, 1943, Nisley and Wilson were out of production as a result of USV's preemptive buying program at the doorstep of the Nisley-Wilson Mill. (Tr. 658-663.) Mr. Nisley testified Mr. Burwell took miners off the Nisley & Wilson scales and offered them premium prices to take their ore to Uravan. (Tr. 655-656.) Mr. Nisley testified that during the period January, 1943 to December, 1943, his production was under the control of USV, as agent for Metals Reserve Company, which required him to mill the ore furnished him by MRC and then turn the oxide back to USV, in spite of the fact that petitioners desired the oxide and Mr. Nisley specifically requested that his production go to petitioners. (Tr. 665.) Nisley testified that the Nisley-Wilson Mill went out of production permanently in January, 1944, for the reason that the mill could no longer fight the monopoly control and tactics of respondents. (Tr. 667-668.)

(b) The Blanding Mines Production

The Blanding Mill had been supplying Apex with vanadium oxide shipments from August, 1940, to January, 1941. (Pls.' Ex. 118, Tr. 2209; Pls.' Ex. 131, Tr. 2229-2233.) The relationship between Blanding and Apex was satisfactory. (Tr. 1746.) But then, in the fall of 1941, VCA negotiated the acquisition of the vanadium ore claims of Blanding's lessor, Garbutt. (Tr. 1950; Tr. 1750.) Soon after, on January 9, 1942, Blanding notified Apex that it would no longer sell oxide to Apex. (Pls.' Ex. 131, Tr. 2239; see Pls.' Ex. 127, Tr. 2222.) Petitioners desperately pleaded for the Blanding production. (Pls.' Ex. 131, Tr. 2239-2251.) VCA obtained Blanding's oxide production for the price of $1.10 per pound, f.o.b. mill. (Tr. 1759.) Higher prices offered by petitioners were turned down by Blanding, which was under the control of VCA. (Pls.' Ex. 157, Tr. 2341; Tr. 1738-1740, 1758-1759.) On March 28, 1942, petitioners offered Blanding $1.20 per pound. (Pls.' Ex. 131, Tr. 2246.) Mr. Leir pleaded with Blanding that "you must help us stay in business now, for your sake as well as ours". (Pls.' Ex. 136, Tr. 2244.) Nevertheless the Blanding production went to VCA. Although Blanding, as an independent mill, was exceedingly important to petitioners, it was eventually turned into an ore selling operation by USV as agent for MRC after the Defense Plan Corporation had rehabilitated the mill. (Tr. 1764-1773.)

(c) Shattuck or North Continent Mill

Another of petitioners' suppliers of vanadium oxide was the North Continent Mill. North Continent was turned into an ore selling operation in the Spring of

1943, and ceased to mill vanadium oxide. The payments for the ore came from USV, as agents for MRC. (Df. U's Ex. 3R, Tr. 915-917.)

6. Respondents Prevented Petitioners From Shipping Vanadium Products Into Canada by Utilizing the Power Granted by the Canadian Government to Electromet of Canada, a Wholly Owned Carbide Subsidiary, to Allocate Vanadium Supplies During the War Period

The trial Court excluded documentary evidence and the testimony of Mr. Martin Wolf that, commencing in 1943, as part of the conspiracy between Union Carbide and VCA, Electromet of Canada, a wholly owned subsidiary of Union Carbide acting under direct orders from its parent company, Union Carbide, prevented the petitioners from shipping vanadium products into Canada to Canadian steel mill customers. (Tr. 801-808, 813-817.)

The offer of proof as made by petitioners' counsel, was (Tr. 826-828):

> "Now, if your Honor please, we offer through this witness to prove the following facts, that at the end of 1942 and 1943 the Electro Metallurgical Company of Canada, which had been appointed as the purchasing agent by an agency of the Canadian Government, that is, the purchasing agent for vanadium, determined that it would not permit any further shipments from the Continental Ore Company into the Canadian market. In that connection we offer to prove that he was acting under instructions from the officials of Union Carbide or its affiliate in order to eliminate the plaintiff from the Canadian market."
>
> * * * * *
>
> ". . . We tentatively offer to prove in any event that it was the Carbide officials and employees which directed their wholly-owned and controlled subsidiary

organization, the Electro Metallurgical Company of Canada, Ltd., to eliminate the plaintiff from the Canadian market, to take away his Canadian customers, and to supply those customers between the Vanadium Corporation of America and Union Carbide.

We offer to prove in this connection that it was the intent and purpose of the Carbide officials and employees to use the Canadian agency for the purpose of restraining the plaintiff's trade, and specifically for the purpose of carrying out the conspiracy to restrain and to monopolize the vanadium industry in the United States and Canada. He is one of the means in connection with that monopolization and restrain[t] to eliminate the Continental Ore Company from the business."

7. Petitioners Proved Loss of Profits and Elimination From the Vanadium Industry From Their Books and Records

From 1939 to 1942, petitioners sold an increasing amount of vanadium products. (Pls.' Ex. 119, Tr. 2212.) They sold $60,000 worth of vanadium products in 1939 and $250,000 in 1942. (Id., rounded.) Petitioners' business suffered a decline in 1943, and the results in 1944 and 1945 were token. (Id.)

The loss of Apex in January, 1942 (Df. V's Ex. 1-Y, Tr. 2519), terminating an existing 14-year contract between petitioners and Apex was the last association petitioners could make with ferrovanadium manufacturers.

Apex's production never reached its estimated capacity of between 30,000 and 40,000 pounds of ferrovanadium per month. (Tr. 856, 1113.) Instead, Apex produced less than 6,000 pounds a month (Pls.' Ex. 119, Tr. 2212 ferro-

vanadium). The shortage of vanadium oxide accounted for the lack of full production. Apex stated this in a letter dated September 17, 1941, from Apex to Mr. Leir:

> ". . . as you know, we are not getting a sufficient quantity to run our present facilities on half time." (Df. V's Ex. 1-Q, Tr. 2512-2512A.)

The loss of petitioners' Canadian business caused the sales of Petitioners' Van-Ex to drop from 71,555 pounds in 1942 to 6,480 pounds in 1943. (Pls.' Ex. 119, Tr. 2212.) The substantial business petitioners did with Atlas Steels is shown in Plaintiffs' Exhibit 79 (Tr. 2169-2174, at 2173-2174).

Such losses and exclusions were anomalous to petitioners, who reached spectacular successes in other ores and metals, fluorspar, aluminum, barytes, coal derivatives, phosphates and magnesia products. (Pls.' Exs. 124-126 for Id., Tr. 1097-1107.)

E. Errors Raised to the Court of Appeals for the Ninth Circuit

The points on appeal raised in the Court below are set forth in Appendix F to this Petition. Of course, the Court below did not consider any of these claimed errors, for it decided that the trial Court had erroneously submitted the case to the jury and should have directed a verdict in favor of respondents.

F. The Appellate Opinion

Despite the overwhelming evidence which is set forth briefly above, the Court below held *as a matter of law* that the case should not have been submitted to the jury because the evidence could not support a jury finding

that respondents' violations, which the Court below assumed to have occurred, caused petitioners' injury, which the Court below also assumed to have occurred. The Court held that it had the power to review and reweigh the evidence contrary to the only Circuit Court decision in point which held the Court did not have such power. The Court reached this conclusion even though the trial Court, which had heard all the witnesses and the evidence, felt that the evidence was sufficient to submit the case to the jury. The Court made this determination even though respondents did not obtain any pre-appellate ruling from the trial Court on the sufficiency or insufficiency of the evidence to sustain a verdict and filed no cross-appeal.

Thus, in disposing of the case in this summary manner, the Court below did not rule on any of the contentions raised by petitioners. These are set forth in Appendix F.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT WHICH HAVE HELD: (1) THAT VIOLATORS OF THE ANTITRUST LAWS ARE LIABLE FOR INJURIES TO COMPETITORS THEY INTENTIONALLY PURSUE; (2) THAT VIOLATORS OF THE ANTITRUST LAWS MUST ASSUME THE BURDEN OF PROOF WHEN THE EFFECT OF AN INTENDED OR FORESEEABLE ACT OCCURS

A. The Decision of the Court Below Is in Direct Conflict With Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927), All Landmark Decisions of This Court

Story Parchment Co. v. Paterson Parchment Paper Co., supra, held that proof of conspiracy to eliminate a competitor by three companies holding monopoly power in an effort to maintain such monopoly control, and the demise of the competitor presented sufficient evidence of causation to sustain a finding.

There can be no more certain proof of causation under Section 4 of the Clayton Act than proof of a specific purpose and intent to eliminate a competitor coupled with the actual elimination of the competitor after bona fide attempts by the competitor to remain in the industry. This is *exactly* the situation in the instant case.

We respectfully submit that the Court below, in its review of the evidence, completely lost sight of two basic and salient facts:

(1) Petitioners proved that respondents conspired to monopolize and did actually monopolize all phases of the milling and manufacture of vanadium. In fact, for the

purpose of its opinion the Court below *admitted* this to be true. Thus, the free and open market guaranteed by Congress in the anti-trust laws was destroyed during the entire period in which petitioners claimed damages. Two companies, Union Carbide and VCA, controlled the entire vanadium industry and had the power to control entry into that industry. Executive officers of both companies testified that these companies had as their purpose the exclusion of all competitors and the exclusion of these petitioners in particular.

(2) Although petitioners made bona fide attempts to remain in the vanadium industry, they were unable to do so. Petitioners' failure in the vanadium industry was in complete contrast to petitioners' fantastic and spectacular success in the other lines of ores, mineral and alloys, which offered a free market for petitioners' energies and abilities.

These two factors were not even discussed by the Court below.

Completely contrary to the opinion of the Court below, this Court has held that upon the showing of a monopoly market and the inability of a challenger to succeed in such market, a factual question is presented as to causation, the determination of which is for the trier of fact, the jury in the instant case. This is the precise holding by this Court in *Story Parchment Co. v. Paterson Parchment Paper Co., supra*, reversing (1 Cir. 1930) 37 F. 2d 537.

In *Story Parchment* the majority lower Court opinion reasoned that although there was proof of conspiracy to

monopolize by fixing prices in order to eliminate a sole competitor, a fact assumed to be true in the opinion of the Court below in the instant case, that the jury verdict in the trial Court should be reversed because: (a) loss of profits would be based on surmise and conjecture; and (b) the appellant did not have sufficient capital to meet the competition of respondents anyway. Therefore, the majority opinion concluded, the plaintiff had not proved causation. The majority opinion of the lower Court in *Story Parchment* stated in summary:

> "The plaintiff has not, therefore, sustained the burden of proving that it has suffered any measurable damage from the reduced prices at which it was compelled to sell its product by reason of the alleged unlawful conspiracy of the defendants, or that the subsequent depreciation of its plant was due to any violation of Section 2 of the Sherman Anti-Trust Act (15 USCA § 2) by the defendants." (37 F. 2d 541.)

In a dissenting opinion, Judge Anderson concluded that the damages suffered by plaintiff were not speculative and that the Court had improperly invaded the province of the jury in determining that the plaintiff would have died anyway. The dissenting opinion's statements are precisely applicable here. The Court stated (p. 542):

> ". . . In a word, we have here, indisputably, a combination to kill a competitor followed by the speedy death of that competitor."

And at pages 543-544 of the dissenting opinion, Judge Anderson stated:

> "The statements in the majority opinion that the plaintiff went out of business for lack of sufficient

capital, 'and that its failure was inevitable, either from lack of capital or inefficient management or both,' amount to usurping the function of the jury. Indeed, the opinion on damages does not read at all like the opinion of an appellate court, dealing only with questions of law; it deals largely with facts solely for the jury.

"There is no discussion of the soundness of the trial court's instructions on damages. By necessary implication, they are conceded to be correct. The conclusion is (to repeat) that, without the defendants' conspiracy to put the plaintiff out of business, it would have died anyway. The logic is, in that regard, hardly distinguishable from setting up the mortality of all human beings as a defense to an indictment of manslaughter or murder. The undeniable facts are that the defendants conspired to kill the plaintiff, and the plaintiff died. The majority opinion is to the effect that the conspiracy was unnecessary; that the plaintiff would have died anyway. I do not assent to such reasoning or its results."

This Court granted certiorari and rejected the majority opinion of the lower Court and adopted Judge Anderson's dissenting opinion. This Court held "That the petitioner was injured in its business and property as a result of this unlawful combination we think also finds sufficient support in the evidence." (282 U.S. 250.)

As to the conclusion of the lower Court that plaintiff could not prove that defendants caused the depreciation of the plant since it lacked sufficient capital anyway, this Court stated:

"Disposing of the second item of damages, the court below, after referring to evidence tending to

show that petitioner was not in a thriving financial condition, said that petitioner was without capital to meet the situation which it faced, even if there had been no conspiracy and there had been open competition; and that its failure was inevitable either from lack of capital or inefficient management or both. The court therefore concluded that petitioner had not sustained the burden of proving that the depreciation in value of its plant was due in any measurable degree to any violation of the Sherman Act by the respondents. But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body. Whether the unlawful acts of respondents or conditions apart from them constitute the proximate cause of the depreciation in value was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view of the circumstances of fact attending it.' Milwaukee etc. Railway Co. v. Kellogg, 94 U.S. 469, 474, 24 L. Ed. 256. And the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." (282 U.S. 566-567.)

The *Story Parchment* factual situation is indistinguishable from the factual situation presented in the case at bar. In the *Story Parchment* case, as in the instant case, petitioner was the sole challenger to the monopolists. In the instant case, two monopolists conspired to maintain domination; in *Story Parchment* three monopolists conspired to maintain domination. In the instant case, the court below conceded, for the purpose of the opinion, that

respondents did in fact conspire to monopolize the industry. So did the Appellate Court in the *Story Parchment* case.

The *Story Parchment* decision by this Court stands for the proposition that Appellate Courts are in error when they fail to give effect to the intended effects of the conspiracy and the natural tendency which the acts committed pursuant to such illegal purpose have on competition. In the instant case we have that exact factual situation. Respondents intended to eliminate petitioners from the vanadium business. Mr. Burwell so testified. (Tr. 546-547, 222-226, 611.) We submit it is gross error under the *Story Parchment* case to refuse to allow the jury to determine whether or not the acts of respondents, who had as their intention and purpose the elimination of all competitors, caused the elimination of petitioners.

Indeed, the legal presumption is that a conspiracy to eliminate competition continues until it succeeds. As stated by this Court in *United States v. Kissel*, 218 U.S. 601 (1910), at 607-608:

> ". . . A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed."

Under the holding of the *Story Parchment* case, the question of causation is a question of fact determinable by the trier of fact when a plaintiff proves a conspiracy to monopolize, a purpose and intention to eliminate him and his actual elimination from the industry after bona fide attempts to remain in the industry. In the case at

bar, petitioners proved all these facts and more. In *Story Parchment* the defendants merely reduced prices; here there were affirmative, predatory acts of refusals to deal, of obstruction of sources of supply, of commercial interference with petitioners' manufacturing associates so as to disrupt petitioners' arrangements with these associates and thereby keep petitioners out of the industry, of a deliberate and successful elimination of petitioners from an existing and profitable export business.

The opinion of the Court below is also in direct conflict with this Court's opinion in *Bigelow v. RKO Radio Pictures, supra.* The holding of this Court in *Story Parchment* was strengthened by the *Bigelow* case. In the *Bigelow* case, this Court held that a jury could conclude as a matter of just and reasonable inference from proof of defendants' wrongful acts, their tendency to injure plaintiffs' business, and from evidence of a decline in prices, profits and values not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. (327 U.S. at 264.)

The *Bigelow* case puts the burden on the wrongdoers to show that other forces led to the injury suffered by plaintiff. To the contrary, the opinion of the Court below would offer protection to violators of the anti-trust laws. Although the opinion below concedes that respondents conspired to injure petitioners, conspired to drive them out of business, conspired to achieve the end result which did in fact occur and concedes that petitioners did go out of business just as respondents intended, it concludes that a jury could not as reasonable men conclude that

respondents' conspiratorial and predatory acts were the cause of petitioners' demise and resultant injury. In effect, the opinion of the Court below asks that causation be proved by more than the mere preponderance of the evidence required in civil cases. At the very least, a factual conflict was presented by the evidence and the Court below acted in direct confiict with both the *Bigelow* and *Story Parchment* decisions of this Court in ruling that the evidence was insufficient *as a matter of law* to support a finding by a jury that petitioners' elimination from the vanadium industry and their resultant damage were caused by respondents' acts committed in violation of the anti-trust laws.

B. The Decision of the Court Below Is in Direct Conflict With Decisions of This Court and Decisions of Other Circuit Courts

1. In a Monopolized Market a Party Asserting a Bona Fide Right to Compete Need Not Necessarily Show a Refusal to Deal and Certainly Is Not Required to Show Both Refusals to Deal <u>and</u> Obstruction of His Other Sources of Supply

The Court below has created a great burden on those dealing in a demoralized and monopoly market. It had before it a Section 2 case. It was faced with undisputed proof of complete control over the manufacture and sale of vanadium products and a showing of numerous bona fide attempts by petitioners to enter the monopolized industry. In spite of these factors, the Court stated:

> ". . . Yet, even if the *Bigelow* decision could be enlisted to serve appellants' purposes, it was still incumbent upon them to shown on the trial that their reiterated lack of supplies was the result of defendants' refusals to deal with them and of defendants'

efforts to prevent them from obtaining raw materials elsewhere." (Opinion, Appendix A, pages 11-12.)

We respectfully submit that this holding is in direct conflict with the decisions of this Court and the decisions of other circuits for the following reasons:

(a) One dealing in a monopoly market and faced with conspiratorial and predatory tactics need not deal with the monopolists or conspirators. He may take independent avenues of competition and sue the conspirators for damages caused to him by their violation of the law. This basic rule we thought settled once and for all in 1904 by *W. M. Montague & Co. v. Lowry*, 193 U.S. 38 (1904), wherein this Court stated (p. 47):

> ". . . The plaintiffs, however could not by virtue of any agreement contained in such association, be legally put under obligation to become members in order to enable them to transact their business as they had theretofore done, and to purchase tile as they had been accustomed to do before the association was formed."

Further this Court has expressly sustained judgments or actions for damages by plaintiffs, who, after having been members of an association, disassociate themselves from the association knowing that they will be boycotted or face the loss of supplies and customers. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Charles A. Ramsay Co. v. Associated Bill Posters*, 260 U.S. 501 (1923); *Radovich v. National Football League*, 352 U.S. 445 (1957). It is basic that it is not incumbent on a business man, under the protection of the Sherman Act, to do business with those having the purpose and

intention of injuring him and excluding him from the market place.

(b) The unlawful acquisition and maintenance of 90% to 100% control of the sources of supply, vanadium oxide in this case, places an obligation or duty on the monopolists not to exclude, and, contrary to the opinion of the Court below, places on them a burden of equal and open dealings with those aspiring to compete.

It is respectfully submitted that the Court below has erroneously placed the burden of doing business under the Sherman Act on the wrong party. The Sherman Act created liability for injured parties because it imposed a duty and obligation on business men not to reach out and destroy the free market by preventing entry and access to the market place and by fixing prices. The Sherman Act created a duty of conduct, for the breach of which Congress sanctioned a jury trial and a judgment for damages. The duty of care, then, is on the violators of the law, and it is not within their power to foreclose a competitor's entry into the market place and then demand useless requests from him. If the law were otherwise then this Court's holding in *United States v. Griffith*, 334 U.S. 100, 107 (1948) is pure commentary:

> ". . . It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor, is unlawful."

And, if this be law, petitioners herein are entitled to damages upon proof of such unlawful conduct with impact on them.

Violators of Congressional standards are liable for all consequences of the acts they intend or which are foreseeable. *Bigelow v. RKO Radio Pictures, supra; Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Stone v. New York, C. & St. L. R. Co.*, 344 U.S. 407 (1953); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957).

Upon the showing of a refusal to deal at the comparable rates or prices charged to members of the combination, there is clearly no obligation to seek discriminatory and unfavorable treatment.

In the instant case, petitioners proved that Union Carbide subsidized the domestic production of ferrovanadium of its principal competitor, VCA, by supplying it with large quantities of oxide at prices 30¢ a lb. below the standard contract price of $1.10 a lb. (Pls.' Ex. 8, Tr. 2073-2074.) Petitioners proved that Union Carbide mined and milled vanadium ore for VCA (id., Pls.' Ex. 149, Tr. 2277-2340.) Petitioners further showed that though Union Carbide supplied its co-conspirator VCA with oxide, petitioners could not obtain supplies from respondents during the period 1939 to 1946, except on government request. And even upon intervention by Metals Reserve Corporation, the evidence showed that though Union Carbide supplied petitioners, it charged them a premium price of $1.15 a lb. for oxide, 5 cents more than Union Carbide's contract price of $1.10 a pound and 35 cents more than Union Carbide's price to VCA. (Pls.' Exs. 4-5, not printed.) Under these discriminatory circumstances petitioners were not bound to remain in business and to pay

exorbitant rates which would prevent their economic success. *Story Parchment Co. v. Paterson Parchment Paper Co., supra.*

(c) This Court has never even remotely suggested that equality of opportunity is dependent upon a showing that there be requests of those who conspire to monopolize *AND* a showing that these monopolists thwarted all avenues of supply.

The Court below ruled that it was incumbent on petitioners to prove both a refusal to deal *and* that respondents prevented them from obtaining raw materials elsewhere. By the use of the word "and" the Court below would require both these conditions as necessary conditions precedent to liability. This is a clear departure from established authority and in direct conflict with the cases decided by this Court.

It has been held that the Sherman Act is an act of protection assuring equality of opportunity based on providing the public with the advantage of full and unrestrained competition. The act strikes at "every" restraint against "any person." This Court has repeatedly stated that there need not be total restraint or total control of the market. *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U.S. 255 (1940); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Indiana Farmer's Pub. Co. v. Prairie F. Pub. Co.*, 293 U.S. 268 (1934). *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra*, would seem to be a decisive holding that conspirators need not deprive a plaintiff of all supplies and thwart all avenues of supply. The boycott of competitive goods is sufficient to establish liability.

The Court below cited *no* authority from this Court which supports the novel conclusions reached in its opinion. Rather the opinion fails to apply the landmark case of *Bigelow v. RKO Radio Pictures, supra,* and actually casts great doubt on its holding. The Court admits in its opinion that *Bigelow, Eastman Kodak,* and *Story Parchment,* all landmark cases decided by this Court, hold that where a plaintiff proves a loss and a violation by defendant of the anti-trust laws of such nature as to be likely to cause the type of loss which in fact occurs, the jury, as the trier of fact, must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists. (Opinion, Appendix A, page 11.)

However, the Court then concluded that it was "not sure" that *Bigelow* applied to this factual situation, i.e., a factual situation where the loss claimed is of specific business arrangements rather than a general loss inflicted by the defection of countless individual customers.

We know of no case in which this Court has even intimated that the holding in the *Bigelow* case is limited to any particular set of facts. The opinion of the lower Court is in direct conflict with the *Bigelow* case and creates confusion where none formerly existed. The Court's statement that it is "not sure" as to whether *Bigelow* applies now permits lower Courts to pick and choose situations wherein they can apply a holding by this Court according to their prejudices. The end result of the lower Court's uncertainty is that the private litigant is no longer certain as to what rule of causation is applicable to his particular case. The decision below embraces an interpretation of the Sherman Act which greatly narrows the meas-

ure of protection afforded the private litigant and seriously impedes the availability of the treble damage remedy to a private litigant who is the victim of a conspiracy and predatory tactics, as were the petitioners in this case.

In any case, the opinion of the Court below has created a confusion in the field of causation which can do only harm to a private litigant and which eliminates a standard which this Court has established for the guidance of both private litigants and lower Courts.

It is very respectfully submitted this Court should grant certiorari if only to resolve this confusion.

2. Even Assuming the Correctness of the Legal Conclusions of the Court Below, the Opinion Conflicts With a Just and Reasonable Interpretation of the Record as Required by This Court in Story Parchment Co. v. Paterson Parchment Paper Co., Supra

With due deference to the learned Court below, we respectfully submit that its opinion conflicts with the facts as revealed by the record. This conflict was raised and called to the Court's attention in petitioners' petition for Rehearing, which was denied. (Appendix C, page 26.)

(a) Contrary to the Statements in the Lower Court's Opinion, During the Year Prior to the Apex Cancellation, Petitioners Requested Supplies From the Respondents

In the opinion below, the Court stated that petitioners failed to make requests for supplies for a year prior to the time that lack of supplies caused Apex to end its relationship with petitioners and that this failure to make requests for supplies during the "final and most critical period of the Apex contract" made it impossible for the jury to find that respondents' refusal to deal caused Apex to terminate its business arrangement with petitioners.

But to the contrary, the record shows that Apex or petitioners did try to obtain supplies during this "critical" period.

On January 27, 1942, petitioners were notified by Apex that it was discontinuing its relationship with them. (Df. V's Ex. 1, Tr. 2519.) Production continued until June, 1942, by special agreement between Petitioners and Apex because Apex was advised that petitioners had a binding agreement with Apex and petitioners were objecting strenuously to this breach of contract by Apex. (Pls.' Ex. 62, letter dated 4-14-42, Tr. 675-676.) To stay in the vanadium business as long as they could by any means, petitioners agreed that Apex would convert all the quantities of vanadic acid petitioners could obtain for Apex from Blanding, Nisley & Wilson, and Shattuck. (Pls.' Ex. 122, Tr. 2215-2221.) Thus, the "critical year" would be from January, 1941 to January 22, 1942. It is uncontradicted that during this "critical" period, petitioners took various actions to obtain needed supplies of vanadium oxide. (See Table appearing at page 29 of this petition for the numerous requests made by petitioners.)

On July 7, 1941, petitioners requested that the Office of Production Management intervene in their behalf to secure supplies of oxide for them. (Pls.' Ex. 132, Tr. 2265.) Union Carbide and VCA *both* declined to supply petitioners. (Pls.' Ex. 132, Tr. 2265.)

Petitioners first had asked for the oxide itself (Pls.' Ex. 77, Tr. 776), then that they at least be allowed to process the oxide for respondents (Pls.' Ex. 77, Tr. 776), and finally that the government intervene to acquire supplies for them, so serious did they consider the supply

situation to be. Yet, in every instance, petitioners were refused and they received no supply.

From October to December, 1941, petitioners frantically attempted to obtain oxide. Having been turned down by respondents, petitioners centered their attention on obtaining acid from the Defense Plant Corporation Monticello Plant, which was under the administration of VCA. (Pls.' Ex. 144, Tr. 2266-2270.) On December 3, 1941, Apex requested the Defense Plant Corporation to sell them vanadium oxide from the Monticello Plant which was to be erected. (Id., Tr. 2266.) This request was suggested to Apex by petitioners after petitioners learned that VCA was to construct the plant. (Tr. 2267.) Again on December 26, 1941, Apex wrote the Vanadium Division, Office of Production Management, seeking a source of oxide supply. (Pls.' Ex. 146, Tr. 2271-2272.) These requests were made by Apex at the urging and insistence of Mr. Leir. (Id., Tr. 2273-2275.) That Mr. Leir felt it was the better exercise of business judgment to attempt to get government aid in obtaining supplies which were denied him directly by respondents is obvious. Mr. Leir wrote:

> ". . . As far as we can see, the production of Ferro Vanadium has been mainly localized to two very big outfits in this country, and we think we are not asking too much if we apply to you for a better distribution of the available Vanadium Oxide, all the more as the Government is spending a lot of money for new production facilities and road construction out West." (Pls.' Ex. 146, Tr. 2275.)

Contrary to what the opinion of the lower Court states, the evidence showed a steady and determined joint refusal by respondents to sell to petitioners.

By February 16, 1942, petitioners had received assurances of governmental cooperation in obtaining additional supplies of vanadic acid. (Df. V's Ex. 2-A, Tr. 1176-1185, at Tr. 1177.) Four days after this letter was written, VCA held the meeting with Apex which finally resulted in direct commercial arrangements between Apex and VCA for the purchase of aluminum ingots by VCA, which, in the circumstances of this case, certainly permitted the inference to be drawn that the consideration for these arrangements was the discontinuation of the contract petitioners had with Apex. (Pls.' Ex. 62, Tr. 672-676, 1335-1336, 1947-1949, 2144-2146.)

Therefore, the record shows numerous requests by petitioners to buy from respondents a year before the notice of cancellation was sent by Apex to petitioners, deliberate refusals to deal with petitioners by respondents, and bona fide attempts by petitioners to obtain vanadic acid from other sources.

Furthermore, the refusal of Blanding Mines to deal with petitioners in January, 1942, after VCA had acquired Blanding's ore bodies, can also be construed as an act of a co-conspirator in refusing to deal.

(b) Contrary to the Statements in the Lower Court's Opinion, the Record Does Contain Evidence of the Pending Negotiations Between Petitioners and the Climax Molybdenum Co.

In the opinion below, the Court stated that the record contained no evidence of the nature of the "pending negotiations" between Climax, and petitioners.

But such a conclusion can be drawn only by ignoring completely the direct testimony of Mr. Wolf, petitioners'

Vice-President. Mr. Wolf testified that petitioners lost Climax as an associate because of respondents' interference with Climax (Tr. 978) and that respondents prevented the *continuance* of petitioners' existing relationship with Climax by their interference and threats of reprisals. He stated:

> "We had at that time lost as partners in this field Apex Smelting, who had previously manufactured ferrovanadium in conjunction with us as our partners. We had likewise lost Climax Corporation, who had done the same thing to us, and did not *continue* because of interference by the defendants with Climax." (Emphasis supplied.) (Tr. 978.)

Mr. Wolf's testimony was substantiated by other evidence. For example, on May 21, 1943, petitioners requested that Electromet fill Continental's oxide requirements *for the remainder of the year.* (D's Ex. U-4-M, Tr. 955-56.) On that date, Mr. Wolf wrote to Electromet Sales:

> ". . . We are perfectly willing to sign a contract with you for our requirements until the end of the year. At present, these requirements are estimated to amount to about 10,000 lbs. of V contained in pentoxide *per month.*" (Emphasis added.)

Mr. Wolf testified that this request, made in the latter part of May, 1943, was specifically for a *continued* arrangement with Climax. He testified,

> "Q. Do you recall for which of these contracts you made that demand for the requirement contract?
>
> A. Which of these——?
>
> Q. For which of either the Imperial or the Climax contract?
>
> A. That was in June? No.

Q. June of '43?

A. *June of '43? That would have been probably for Climax, I would say.*

Q. Now then, you never did get the requirement contract?

A. No.

Q. In 1943, did you?

A. No." (Tr. 1018, emphasis added.)

Respondents rejected this request and denied petitioners any supply.

In other words, petitioners were requesting oxide for their Climax contract as late as June, 1943. Thus, this Court's statement that the "earlier transaction stands alone in the record as the only connection between Climax and Continental" is in error, as is its conclusion that the threat of reprisal was made to a corporation with which Continental had no business. Climax was to continue their arrangement with petitioners to produce ferrovanadium for them. Mr. Wolf so testified. (Tr. 978, 1018.) Petitioners' offer of proof showed that respondents threatened Climax with reprisals to disrupt petitioners' association with Climax and thereby prevent petitioners from staying in the vanadium business.

The Court below overlooked or failed to consider pertinent facts as to the Climax relationship. It completely and incorrectly swallowed respondents' theory of the transaction and gave petitioners none of the inferences to which their evidence entitled them.

(c) Petitioners Specifically Attempted to Obtain Vanadium Supplies From Respondents for the Imperial Paper & Color Co. Relationship

The opinion of the Court below held that petitioners could not complain of any injury because of the loss of their relationship with Imperial Paper & Color Co. because petitioners could not show that they sought to alleviate their lack of supply by seeking supplies from respondents at any time during the life of the Imperial venture.

But the proof was to the contrary. The requests for supplies made by petitioners in November, 1943, only a month and a half before the signing of the Imperial contract, were for the specific purpose of supplying Imperial with vanadic acid for its manufacturing arrangement with petitioners. (Tr. 1012-1013.) Since petitioners had been turned down previously in a period when oxide was clearly available, any trier of fact could reasonably and justly conclude that petitioners did not need to make any useless demands upon those who consistently had refused to supply them. At the time Imperial was attempting to obtain a steady supply of vanadium products for its arrangement with petitioners, respondents held a 100% control of the domestic vanadium oxide and ferrovanadium production. (Pls.' Exs. 18, 136-138, not printed.)

(d) The Nisley and Wilson Mill Was Out of Production From October, 1942, to April, 1943, as a Result of the Acts of the Respondents

The Court below stated that petitioners' refusal to buy the Nisley and Wilson Mill's production from MRC after April, 1943, prevented them from claiming any interference by respondents during the Van-Ex period. (Opinion, Appendix A, pp. 18-19.)

But the evidence showed that respondents' conspiracy to monopolize shut down the Nisley and Wilson mill from October, 1942 to April, 1943. (Tr. 662-663.) Mr. Nisley himself testified that respondents caused him to cancel his relations with petitioners (Tr. 658), and that respondents caused his mill to fall under the control of USV, an agent for MRC. (Pls.' Ex. 74, Tr. 2162-2168, Tr. 660.)

Petitioners' refusal to acquire unflaked oxide from Nisley and Wilson is not determinative of any issue whatsoever. (Tr. 932-933.) Initially, a monopolist may not demand that his competitors obtain unwanted materials after he has refused to deal with them pursuant to a purpose and intent to exclude. Secondly, at the very most, the failure to buy unflaked oxide was just a factor which the trier of fact could weigh with the other evidence to determine whether there was an exclusion.

It is submitted that it is error for a Court to usurp this jury function by rationalizing the evidence and making a determination of a question of fact, which the Court below did in this case.

(e) Petitioners' Failure to Acquire 300,000 Pounds of Oxide in January, 1944, Related Not to "Oxide", as the Court Below Concluded, But to Raw Ore in Stockpile Owned by MRC and Concerned a Time Period After Nisley & Wilson Had Already Closed Their Mill as a Result of Respondents' Activities

The opinion of the Court below is also in error in stating that Nisley and Wilson had on hand a stockpile of approximately 300,000 pounds of oxide which they tried to sell to petitioners in the spring of 1944 and which petitioners refused to buy. (Appendix A, Opinion, p. 19.)

The evidence showed that Nisley and Wilson had closed their mill in January, 1944, as a direct result of respondents' activities. (Tr. 667-668.) Therefore, Mr. Nisley was not offering petitioners the production of his mill, which was not then even in operation. Mr. Nisley was merely suggesting that he process a stockpile of raw ore located at Gateway which did not belong to Nisley and Wilson, but to MRC. (Tr. 732-734.) The offer was simply the expression of an idea. Prices, terms, and Nisley & Wilson's actual ability to obtain the stockpile were conjectural. However, in spite of this, the evidence showed that Mr. Leir stated that he would "give [Nisley] all possible cooperation". (Df. U's Ex. 2-W, Tr. 733-734.) The evidence was that Mr. Nisley was forced to terminate his production although he knew that petitioners would buy all the material he could produce. (Tr. 667.) Mr. Nisley so testified. (Tr. 667.) This is but another example where the Court below evaluated the evidence, failed to draw proper inferences and usurped the function of the jury to decide a conflict in the evidence.

(f) Petitioners' Failure to Buy Flakes From Nisley and Wilson in October, 1943, Related to a Plan in the Future Since Nisley and Wilson Were Under the Control of USV, Agent for MRC From April, 1943, to January 1, 1944

The opinion of the Court below is also in error when it states that petitioners refused oxide offers from Nisley and Wilson in November, 1943, at a time when petitioners claimed respondents failed to supply them with their requests for oxide. (Opinion, Appendix A, pp. 18-19.)

Nisley and Wilson's production was under the control of MRC from April, 1943 to January 1, 1944. (Pls.' Ex.

74, Tr. 677, 2162-2168.) It was not until the middle of December, 1943, that Nisley and Wilson learned of the cancellation of their contract by MRC (Df. U's Ex. 2-U, Tr. 729, 2440.) On December 1, 1943, USV had been given the discretion to cancel out Nisley & Wilson with the qualification that USV could continue this relationship if it believed that "this program should be continued in the interest in the procurement of other products than vanadium." (Df. U's Ex. P, Tr. 408-409.) It is obvious that in October, 1943, a time when Nisley's production was controlled by USV, Nisley and Wilson could not have been offering their production to petitioners. Obviously, Mr. Nisley was only thinking ahead to post-war conditions. (Df. U's Ex. 5-J, Tr. 1209, 2471-2473.) This is substantiated by Mr. Leir's reaction to Mr. Nisley's suggestion. Mr. Leir, rather than being uninterested, as the Court below concluded, wrote to Nisley:

> "We would also like to know whether you believe that after the war you will be in a position to either operate your own mines or to buy ore from independent miners.
>
> "The war may be over in the not too distant future, *and we would like to obtain an idea as to what your situation would be at that time.* There are already signs of abundance of basic ores and minerals, but we are anxious to cooperate with you and keep your mill running in peacetime.
>
> "*Please let us know at the same time when your present contract with the Metals Reserve Company expires.*" (Tr. 1210, 2473, emphasis added.)

II

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE FIRST, FOURTH AND SEVENTH CIRCUITS ON THE REASONABLENESS OF PETITIONERS' EFFORTS TO SEEK ENTRY INTO THE MARKET PLACE AND THE NECESSITY OF DEMANDS OF OXIDE FROM RESPONDENTS

A. The Reasonableness of Petitioners' Conduct in Seeking Entry Into the Market Place

On the basis of the conflict presented by the evidence, only the trier of fact, the jury in the instant case, could determine the reasonableness of petitioners' conduct in seeking bona fide entry into the market place. Monopolists cannot require businessmen to take alternative courses in confronting the monopoly.

Having shown that the conspiracy to monopolize included as one of its elements the exchange of oxide between respondents in order to support each other, petitioners could rely upon their requests for supplies at reasonable prices which would allow their entry into the market place. This presented a prima facie case for the jury's determination. The Fourth Circuit held in *American Federation of Tobacco Growers v. Neal* (4th Cir., 1950), 183 F. 2d 869, that monopolists are bound to entertain business with competitors under reasonable conditions even though they possess advantages stemming from the expenditure of substantial capital. This ruling was followed by the First Circuit in *Gamco, Inc. v. Providence Fruit & Produce Bldg.* (1 Cir., 1952), 194 F. 2d 484. At page 487 that Court stated:

> "... To impose upon plaintiff the additional expenses of developing another site, attracting buyers, and transhipping his fruit and produce by truck is clearly

to extract a monopolist's advantage. [Case cited.] The Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones. [Cases cited.]"

B. In Holding That a Demand for Oxide From Respondents Was Indispensable in a Case Which Showed a Conspiracy to Monopolize an Industry Resulting in 100% Control and a Purpose and Intention to Eliminate Independent Competitors the Court Below Is in Conflict With the Seventh Circuit

It is not incumbent on one who enters into the market to demand that a conspiracy to monopolize cease. Having shown that respondents were aware of petitioners' competition, and having shown a purpose and intention to eliminate them, petitioners were under no obligation to continually renew attempts to obtain supplies. *Congress Building Corp. v. Loew's, Incorporated* (7 Cir. 1957), 246 F.2d 587. At page 595, that Court stated:

". . . The defendants had a duty to refrain from acts injurious to others and we know of no rule that states that demand is necessary in an action to enforce a liability arising from a tortious act. See generally, 1 Am. Jur., Actions § 36; 1 C.J.S. Actions § 27; 86 C.J.S. Torts § 51. Neither Section 4 of the Clayton Act, nor the terms of any agreement or undertaking by plaintiff with any of the defendants, express or implied, nor the circumstances of this case require a demand as a condition precedent to the maintenance of this action."

III

THE COURT BELOW ERRONEOUSLY APPLIED THIS COURT'S DECISION IN EASTERN RAILROAD PRES. CONF. v. NOERR MOTOR FRGT., INC. (1961), 365 U.S. 127, 81 S.CT. 523, WHICH ONLY HELD THAT THE SHERMAN ACT DOES NOT APPLY TO JOINT ACTION TO LOBBY OR TO INFLUENCE THE PASSAGE OF LEGISLATION

A. Eastern Railroad Pres. Conf. v. Noerr Motor Frgt., Inc., Supra, Does Not Apply to the Exclusion of Competition Accomplished Under and Pursuant to the Terms of a Conspiracy to Monopolize an Industry by Predatory Business Tactics, Part of Which Conspiracy Included the Use of One of the Co-Conspirator's Subsidiaries Which Had Been Given the Power to Allocate Vanadium by the Canadian Government to Exclude Petitioners as Competitors and Arrange Market Division

The exclusion of petitioners from the Canadian market was part of an overall plan to conspire to monopolize the vanadium industry. Electromet of Canada, a Canadian subsidiary of Union Carbide, was appointed by the Canadian government to act as its agent in purchasing vanadium for its steel makers. Electromet of Canada was given authority to use its discretion in making purchases and was never authorized by the Canadian government to conspire with any other company. It was simply supposed to allocate the purchase of oxide. However, respondents, both American corporations, were engaged in a conspiracy to monopolize the vanadium industry, a part of which conspiracy was to eliminate petitioners. In furtherance of the basic conspiracy, Electromet of Canada, the wholly owned subsidiary of Union Carbide which was completely dominated and controlled by Carbide, was ordered by its parent Union Carbide to allow into Canada only shipments of oxide from Union Carbide

and VCA and to prevent and eliminate petitioners from selling their products to their customer, the Atlas Steel Co. in Canada. The power given to Union Carbide's Canadian subsidiary was used by respondents to further the basic conspiracy to eliminate petitioners. The Canadian government was not charged with any illegality in this case, and was totally oblivious to the purpose for which the Canadian subsidiary refused to allocate to petitioners or their customers. The elimination and the predatory tactics dictating the policy of the Canadian Company which brought about the elimination of petitioners took place in the United States and was an arm of the American conspiracy. The citation by the Court below to *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra,* to support the proposition that the above described conduct does not violate the Sherman Act is erroneous.

The *Noerr* case is a narrow and specific holding that the Sherman Act does not control joint action to lobby or to influence the passage of legislation, although, even in this field, this Court concedes "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified". (81 S. Ct. 533.) It is clear that the purpose and objective in the *Noerr* conspiracy was to associate and bring about forceful lobbying campaigns for the advantage of the lobbying group. The Canadian market arrangement, in the instant case, was a

strict and classic market division agreement under which Union Carbide instructed its Canadian subsidiary to allocate vanadium imports only to Union Carbide and VCA, to eliminate petitioners from the Canadian field, to take away petitioners' Canadian customers, and to allocate those customers between VCA and Union Carbide. (Tr. 828.) This traditional, predatory conduct has always been held to violate the Sherman Act. Furthermore, the elimination of competition, even under the tacit approval of governmental representatives, does not grant any kind of immunity from Sherman Act violations. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Acts done to give effect to the conspiracy may be in themselves wholly innocent acts, but still the conspiracy taken as a whole may violate the Sherman Act. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). The present action was against private corporations for their private action and does not, for example, involve in any way "state action" as was involved in *Parker v. Brown*, 317 U.S. 341 (1943).

B. Respondents' Unlawful Use of the Subsidiary's Canadian Agency Agreement for the Purpose of Violating the Anti-Trust Laws Did Not Immunize Respondents From Liability

Private corporations such as Union Carbide and VCA are not immune from the anti-trust laws if they conspire to violate the anti-trust laws, and if, as part of that conspiracy, they unlawfully use an agency agreement which the Canadian government has with one of their wholly controlled subsidiaries, to eliminate competitors from the Canadian market. Private corporations who undertake, through subsidiaries or otherwise, to assume certain

functions for the government are themselves responsible for their own tortious conduct when said conduct conflicts with the anti-trust laws. It is fundamental that legal means may not be used to accomplish an illegal objective and that the cloak of an agency agreement cannot be used to violate the Sherman Act.

In *Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transport Ass'n* (D.C. Cir. 1958), 253 F. 2d 877, cert. denied 361 U.S. 930 (1960), it was held that even though the alleged conspiratorial agreements were within the specific immunity section of the Interstate Commerce Act and although a certificate of immunity may have been obtained, the agreements therein concerned nevertheless would be held to be violations of the anti-trust laws if they were part of a plan of conspiracy to eliminate competition. The Court held (p. 887):

> ". . . Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition of Aircoach, rather than used merely to meet that competition, the practices would be removed from the protection of section 5a (9)."

In *State of Georgia v. Pennsylvania*, 324 U.S. 439 (1945), defendants contended, in answer to a charge that they had fixed rates in violation of the anti-trust laws, that the ICC had actually approved the rates under the ICC Act standards. This Court held that even though rates were cleared by the ICC, the anti-trust laws were violated if the rates fixed, although reasonable and non-discriminatory, were restrictive rather than competitive.

Similarly, in *United States v. Socony-Vacuum Oil Co., supra*, this Court held that defendants were not immunized from violations of the anti-trust laws merely because government employees knew or approved of the activities in question.

To the same effect are: *Kobe, Inc. v. Dempsey Pump Co.* (10 Cir. 1952), 198 F. 2d 416, cert. denied 344 U.S. 837 (1952); *Bankers Life and Casualty Company v. Larson* (5 Cir. 1958), 257 F. 2d 377; *Floyd v. Gage* (4 Cir. 1951), 192 F. 2d 137; *Crummer Co. v. Du Pont* (5 Cir. 1955), 223 F. 2d 238, cert. denied 350 U.S. 848.

It has been long established that immunity from the anti-trust laws will not be created by implication, and that even when granted, the immunity will not extend to acts beyond the legitimate objects of the conduct immunized. (*United States v. Borden Co.*, 308 U.S. 188 (1939); *Maryland & Virginia Milk Pro. Ass'n v. United States*, 362 U.S. 458 (1960); *United States v. Radio Corporation of America*, 358 U.S. 334 (1960).)

As stated by this Court in *Maryland & Virginia Milk Pro. Ass'n v. United States, supra*, the full effect of the immunity provision involved therein was that although a group of farmers acting together could not be restrained:

> ". . . 'from lawfully carrying out the *legitimate objects* thereof' (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will. [cases cited.]" (pp. 465-466.)

* * * * *

> ". . . It does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on inde-

> pendent producers, processors, or dealers intent on carrying on their own business in their own legitimate way." (pp. 466-467.)

In the same way, the fact that Electromet of Canada had an agency contract with the Canadian government is basically immaterial when it was proved that the corporation was under the complete domination and control of Union Carbide and that the agency relationship was used by Union Carbide and VCA to further a monopoly and conspiracy to control the American vanadium industry and, in furtherance of said conspiracy, to eliminate petitioners' Canadian business and thereby destroy them as a competitor to respondents in the American vanadium business. The citation by the Court below in the *Noerr* case as controlling was erroneous and completely beyond the scope, purpose and intent of the *Noerr* decision.

In *United States v. Griffith*, 334 U.S. 100 (1948), this Court held (p. 107):

> "It follows *a f rtiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor, is unlawful."

V

THE DECISION BELOW IS IN CONFLICT WITH THE SEVENTH AMENDMENT OF THE CONSTITUTION AND THE DECISIONS OF THIS COURT WHICH PREVENT THE REEXAMINATION OF FACTS TRIED BY A JURY

A. An Appellate Court Does Not Have the Inherent Power to Review Judgments Based on Facts Submitted to a Jury Without Having the Issue of Sufficiency of the Evidence Properly Raised by Appeal From a Prior Determination by the Trial Court

Petitioners respectfully urge that the procedure adopted by the Court below is in basic conflict with the Seventh Amendment of the Constitution and the decisions of this Court.

The Court below assumed that it had the power to review a judgment based on a jury verdict after the issue of causation had been given to the jury by the trial Court even though the trial Court had not at any time ruled on the sufficiency of the evidence and respondents had filed no cross appeal specifying the evidentiary issue as a point on appeal. In their appeal from the judgment, petitioners raised serious legal questions. Without any prior ruling by the trial Court, without any cross appeal, without any specification of error on the factual issue of causation by respondents, the Appellate Court volunteered to review the evidence and replace the jury as the trier of fact. It is basic that Appellate Courts can review facts only after the trial Court has made definite rulings on them as a matter of law or only after such issues have been raised by proper motion or appeal. *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732 (1830); *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76 (1891).

In *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913) and *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389 (1937) this Court held that it was unconstitutional for an appellate Court to enter judgment upon appeal from a losing verdict when the trial Court did not reserve a ruling as to the motions attacking the sufficiency of that evidence. In *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935) this Court held that an appellate Court could enter judgment after verdict and contrary thereto where, in accordance with state practice, the district judge had expressly reserved decision on a motion for directed verdict and ruled on that motion after the jury verdict had been received. And in *Galloway v. United States*, 319 U.S. 372 (1943) this Court affirmed the right of the appellate Court to sustain a trial Court's ruling as to the sufficiency of the evidence.

But in each of these cases there was a *prior* ruling by the trial Court at the trial level determining the sufficiency of the evidence *as a matter of law*, which was then properly raised in the appellate Court as a matter of law and as a legal issue. The appeal then was from a ruling of the trial Court. This was a legal issue. In *Redman*, the ruling against appellant occurred by the trial judge after a jury verdict; however, the appellate Court was reviewing a ruling brought to it on a writ of error after a ruling on the issue by the trial judge. Here the trial Court reserved motions for a directed verdict addressed to the sufficiency of the evidence; however, it never ruled on them and submitted the case to the jury. (Tr. 1989.) The trial Court entered judgment on the jury verdict. There was no ruling made by the trial Court after the verdict. No ruling

of the trial Court was appealed or raised to the appellate Court as a legal issue by appeal from any ruling addressed to the sufficiency of the evidence. Rather, the Court below undertook a voluntary review of the facts upon the theory it could sustain a judgment on any grounds without a cross-appeal. In so doing, it recognized it was in conflict with *Thurber Corporation v. Fairchild Motor Corporation* (5 Cir. 1959) 269 F. 2d 841, which is the *only* case in point. Therefore, the Court below failed to follow the only authority directly in point on the issue, passing the *Thurber* case off as being "quite wrong".

But the conflict goes further than a mere conflict with the *Thurber* case. It is submitted that the appellate Court could not, under the Seventh Amendment of the Constitution, review facts and direct a verdict without having before it an appeal from a prior ruling of the trial Court raising the factual sufficiency as a question of law for review. An appellate Court reviews matters of law, not matters of fact. The procedure adopted here was not known at common law. The Court below has erroneously usurped the function of the jury to sit as a trier of fact and determine factual issues properly determinable by the jury. It has not passed on any rulings by a trial Court, for no trial Court ruling of any type was appealed from or obtained by respondents on the sufficiency of the evidence.

The Constitution prohibits what occurred here, i.e., a review of facts by an appellate Court. The prejudice to petitioner is obvious. Petitioners appealed claiming errors which they specified pursuant to appellate procedure. At no time were they apprised by respondents or any one

else that any question was being raised on appeal as to the sufficiency of the evidence until petitioners received respondents' *answering* brief. Respondents did not cross-appeal or specify the sufficiency of evidence as a point on appeal. Accordingly, any designation of the record was not made on that basis, and petitioners were limited to answering these serious allegations in a short and limited reply brief and on a record which was not designated with this issue in mind or as a point on appeal.

The entry of judgment for parties by an Appellate Court without strict conformity with Rule 50, F.R.C.P. has been discouraged by this Court and has not been allowed. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952). Respondents failed to urge any post verdict motions, failed to specify the sufficiency of the evidence as an issue on appeal and did not cross-appeal. Therefore, they chose to accept the submission of the case to the appellate Court *only* on the issues specified by petitioners.

B. The Opinion of the Court Below Conflicts With Established Standards Imposed by this Court on Appellate and Trial Courts in Determining Motions to Dismiss and for Directed Verdict in Order to Insure the Right to Trial by Jury

The decision of the Court below is in direct conflict with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) wherein the Court held that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care" and with the Seventh Amendment which guarantees any litigant a right to a trial by jury. Peti-

ioners were deprived of this right to a jury trial by the Court below.

We respectfully urge that the Court below did not review the evidence as a whole, did not allow the petitioners the benefit of all their evidence, did not draw the inferences and presumptions which could be drawn from the evidence in favor of petitioners, against whom the verdict was directed, did not construe all presumptions in favor of the petitioners and did not resolve all doubts in favor of the petitioners. Just a reading of the opinion of the Court below and the mental gymnastics the Court undertook to rationalize the evidence to reach the conclusions it did reach should be sufficient to point out that there was a serious conflict in the evidence. That the Court below might feel that it would have ruled for respondents had it been sitting without a jury as a trier of fact is immaterial. The conclusion is inevitable that there was a conflict of evidence and that the petitioners were entitled to have this issue determined by the jury. The Court below actually weighed the evidence and made factual determinations on conflicts in the evidence. This it did on a cold record. The trial Court which heard the evidence first hand from the witnesses' lips was of the opinion sufficient evidence was present to submit the case to the jury. We respectfully submit there was such a grave departure from ordinary appellate review by the Court below in directing a verdict that petitioners were deprived of their constitutional right to a trial by jury. *Beacon Theatres, Inc. v. Westover, supra*; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Ellis v. Union Pac. R. Co.*, 329

U.S. 649 (1947); *Stone v. New York C. & St. L. R. Co.*, 344 U.S. 407 (1953); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

A decision which denies the right of the jury to determine the utlimate question of causation after proof of conspiracy to monopolize resulting in a 100% control of an industry and an inability by a competitor to enter into the market place ought not to prevail.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari ought to be granted.

Dated, August 9, 1961.

Respectfully submitted,

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(Appendices A, B, C, D, E and F Follow.)